

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

OSCAR MENDOZA, JR.
Claimant

VS.

AMERICAN WARRIOR, INC.
Respondent

AND

WESTPORT INS. CORP.
Insurance Carrier

Docket No. 1,018,561

ORDER

Respondent requests review of the December 15, 2004 preliminary hearing Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller.

ISSUES

The ALJ ordered respondent and its carrier to provide medical treatment “until further order or until certified as having reached maximum medical improvement.”¹

The respondent requests review contending the evidence fails to establish that claimant suffered an injury arising out of and in the course of his employment with respondent, and that claimant failed to provide respondent with notice of the accident as required by K.S.A. 44- 520. Accordingly, respondent requests the Board reverse the ALJ’s preliminary hearing Order and deny claimant’s request for medical benefits.

Claimant argues that the evidence supports his claim of a work-related injury occurring on or about June 15, 2004. Moreover, claimant maintains he gave proper and timely notice to his supervisor on the day of the accident, on or about June 15, 2004. Thus, claimant requests the Board affirm the ALJ’s preliminary hearing Order in all respects.

¹ ALJ Order (Dec. 15, 2004).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by respondent to work on a 3 man crew at well sites in various locations in western Kansas. On or about June 15, 2004, claimant testified he was “working up here north of Garden [City] and we were working with seven-eighths tubing, and then when we were working putting the tubes in, when I pulled the tube is when I felt - I felt that I hurt my back.”² Claimant further testified he immediately told the co-worker that was with him, Hector Bailon, and his supervisor, Hector Ollarzabal.³

The next day claimant again reported his back pain to Mr. Ollarzabal and claimant testified that Mr. Ollarzabal used “bad words” and told him to keep working.⁴ Claimant says he told Mr. Ollarzabal several times thereafter about his back pain and nothing was done. He further testified that he was afraid to report his injury to the office for fear he would be fired.⁵ Claimant continued to work for respondent until July 9, 2004, and did not seek treatment for his alleged injury.

Mr. Ollarzabal confirmed that he was working with claimant on June 15, 2004, but at no time did claimant inform him that he had hurt his back while pulling pipe.⁶ Then, on July 9, 2004, Mr. Ollarzabal decided to fire claimant as he had made too many mistakes while working on the crew. After informing claimant of this decision, Mr. Ollarzabal indicated that claimant refused to accept his decision. When Mr. Ollarzabal’s supervisor showed up at the site and supported Mr. Ollarzabal’s decision, claimant then alleged he needed to go see a doctor because he had hurt his back. This was the first time Mr. Ollarzabal knew claimant was alleging a back injury.⁷

Claimant then went to Jo (Jody) Smith’s home to ask for his job back. Mr. Smith refused to rehire claimant. At that point, claimant told Mr. Smith he had hurt his back and required medical treatment. Mr. Smith referred claimant to the owner of the company and recommended he report his injury to the main office. Despite this admonition and the fact

² P.H. Trans. at 7.

³ *Id.* at 9.

⁴ *Id.* at 9.

⁵ *Id.* at 10.

⁶ Ollarzabal Depo. at 8.

⁷ *Id.* at 10.

that he had already been fired, claimant admits he never went to the main office and told them of his injury. Mr. Smith denies claimant ever asserted any work-related back injury before July 9, 2004, the date he was terminated.

Hector Bailon confirms that claimant told him, at some point, that his back hurt but there was no mention of the injury being caused by work.⁸

Claimant's present complaints include pain at a constant 8 or 9 out of 10. It does not appear from the record that he has sought treatment from any physician or hospital.

The ALJ granted claimant's request for medical treatment. Implicit in this order is a finding that claimant met his burden of proving a compensable injury. This would include a finding that he sustained an accidental injury arising out of and in the course of his employment and that he gave the statutorily required notice of his injury. After reviewing the record as a whole, the Board finds that the ALJ's Order should be affirmed in part and reversed in part.

The Workers Compensation Act places the burden of proof shall be upon the claimant to establish the right to an award of compensation and to prove the various conditions on which that right depends.⁹ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."¹⁰

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.¹¹

After carefully considering the evidence as a whole, the Board is persuaded, by the barest of margins, that claimant satisfied his burden of proving an accidental injury arose out of and in the course of his employment on or about June 15, 2004. The severity of that injury is questionable given the fact that although claimant maintains his pain is at an 8 or 9 on the pain scale, he has yet to seek medical treatment. Nonetheless, the evidence of the type of work claimant was performing would lend itself to the type of injury claimant alleges.

⁸ Bailon Depo. at 5-7.

⁹ K.S.A. 44-501(a).

¹⁰ K.S.A. 2003 Supp. 44-508(g).

¹¹ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The finding that claimant sustained an accidental injury arising out of and in the course of his employment is affirmed.

The Board is however unpersuaded that claimant provided the timely notice of his work-related injury.

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The Board finds that claimant has failed to prove that appropriate notice of accident was given within 10 days of June 15, 2004. Although claimant says he told his supervisor of a back injury, that supervisor denies it. His co-worker acknowledges being told of claimant's back pain but not of a connection to work. The Board finds that claimant's notice to his supervisor was merely an inference that he had back pain with no indication of an "accident."¹² The same is true with regard to his complaints to Hector Bailon, his coworker.¹³ But even if he had been more specific with Mr. Bailon, he was not a supervisor. In any event, there was no mention of an "accident", only that claimant had back pain. Mr. Ollarzabal denies any knowledge of claimant's alleged back injury until July 9, 2004, the date he terminated claimant's employment. At that point, claimant asserted he was in need of medical treatment allegedly due to a work injury. And he was told to report the accident to the main office, which he failed to do. Based upon the facts as they are presently developed, the Board finds that claimant failed to provide timely notice within 10 days of the date of his accident.

¹² *Ball v. Overnite Transportation Company*, Nos. 219,441 and 219,442, 1997 WL 377949 (Kan. WCAB June 19, 1997).

¹³ Notice to Mr. Bailon would be ineffectual as he was merely a co-worker. See *Parrott v. Sedgwick County*, No. 201,221, 1997 WL 377945 (Kan. WCAB June 27, 1997).

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Pamela J. Fuller dated December 15, 2004, is reversed and the preliminary hearing Order is hereby set aside.

IT IS SO ORDERED.

Dated this _____ day of February, 2005.

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director